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IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

PARTIES TO THE PROCEEDING

The State of Alaska, Department of Environmental Conservation, and Teck Cominco Alaska, Inc. were petitioners in the Ninth Circuit below. The United States Environmental Protection Agency ("EPA"), and Carol M. Browner and Chuck Clarke in their official capacities as Administrator of the EPA and Regional Administrator of the EPA's Region 10, respectively, were originally named as respondents below. Ms. Browner and Mr. Clarke have since been succeeded by Christie Whitman and L. John Iani, respectively.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Alaska, Department of Environmental Conservation ("ADEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced in the appendix hereto ("App.") at 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at App. 17a. The Ninth Circuit's order request-

ing supplemental briefing is reproduced at App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. App. 1a. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 165(a)(4) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, provides, in pertinent part:

> (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility * * *. [42 U.S.C. § 7475(a)(4).]

Section 169(3) of the CAA provides, in pertinent part:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [42 U.S.C. § 7479(3).]

INTRODUCTION

This case raises important and recurring issues concerning the ability of the States to exercise their statutory authority under the Clean Air Act ("CAA")—one of the Nation's most significant and far-reaching environmental statutes. Described as an "experiment in federalism," *Michigan* v. *EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the CAA assigns to the States an important—indeed *primary*—role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to prevent the degradation of air quality in those areas where national clean air standards have been attained. To this end, the CAA prohibits the construction or modification of a "major emitting facility" in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined in the CAA as "an emission limitation * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). The "permitting authority" in this case—and in most cases arising under this provision—is the State. *See* App. 3a.

The CAA thus by its terms gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination. This is confirmed by the Act's legislative history: "The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility *with the State*, to be determined in a case-by-case judgment. It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." S. Rep. No. 95-127, at 31 (1977) (emphases added).

In 1999, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine in

Northwest Alaska, 100 miles north of the Arctic Circle. In accordance with the CAA and the State's own regulations, the State determined that a particular technology—"Low NOx"—was BACT to control nitrogen oxide emissions from the new generator. In making that determination, the State expressly took into consideration "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

Under the guise of exercising its enforcement authority under the CAA, the EPA issued a series of orders prohibiting the construction of the generator because the federal agency disagreed with the State's determination that Low NOx was BACT for the new generator. In seeking to override the State's BACT determination in this manner, the EPA usurped authority that the CAA clearly delegates to the States, upsetting the balance of power that Congress carefully sought to create under the Act. In conflict with decisions of this Court and other federal courts of appeals, the Ninth Circuit sanctioned that result.

The Ninth Circuit's decision poses a grave threat to the ability of the States to exercise the statutory authority vested in them by Congress to make BACT and other important discretionary decisions under the Act. The question presented is a recurring one of national importance, arising not only under the CAA but a broad range of other federal statutes with similar shared authority between the States and federal government. This Court should grant certiorari to resolve the conflict engendered by the Ninth Circuit's decision, and to preserve the delicate balance of power that Congress established under the CAA and similar statutes.

STATEMENT OF THE CASE

Statutory and Regulatory Background. The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention * * * and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State"). Thus, while the CAA assigns to the EPA the responsibility for establishing national ambient air quality standards ("NAAQS"), *see id.* § 7409, the Act gives the States the responsibility for implementing those standards. *See id.* §§ 7407, 7410.

To this end, the CAA requires the States to adopt and submit for the EPA's approval a state implementation plan ("SIP") that provides for attainment and maintenance of the NAAQS. *See id.* § 7410. If a State does not have an approved SIP in place, the Act requires the EPA to adopt and implement a federal implementation plan. *See id.* § 7410(c). The EPA may delegate to a State the authority to implement and enforce any part of such a plan. *Id.* § 7410(c)(3).

The CAA requires that each SIP contain emission limitations and such other provisions as may be necessary "to prevent significant deterioration of air quality" in "attainment" areas. *Id.* § 7471. An "attainment"—or "clean air"—area is one "that meets the [NAAQS] for [a given] pollutant." *Id.* § 7407(d)(1)(A)(ii). The Act establishes maximum allowable increases (or increments) of certain pollutants in clean air areas. *Id.* § 7473. To ensure that such increments are not exceeded, the Act also establishes a preconstruction review process that must be followed before the construction or modification of a "major emitting facility" in a clean air area. *Id.* § 7475. As part of that process, the Act requires that each SIP contain a Prevention of Significant Deterioration ("PSD") permit program, and provides that no major emitting facility may be constructed in a clean air area without a PSD permit. *Id.* §§ 7410(a)(2)(C), 7475(a).

The Act also provides that no major emitting facility may be constructed or modified unless "the proposed facility is subject to the best available control technology [or "BACT"] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." *Id.* § 7475(a)(4). BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [*Id.* § 7479(3) (emphasis added).]

Factual Background. The State of Alaska is a clean air area with respect to nitrogen dioxide, a regulated pollutant under the Act. Under Alaska's SIP, approved by the EPA in 1983, the State operates a PSD permit program through its Department of Environmental Conservation ("ADEC"). Before a PSD permit will be issued for the construction of a new source within the State, the Alaska SIP requires "a demonstration that [a] proposed limitation represents the best available control technology for each air contaminant and for [the] source." 18 Alaska Admin. Code § 50.310(d)(3).

The Red Dog Mine, the world's largest source of zinc concentrate, is located in the harsh landscape of Northwest Alaska, about 100 miles north of the Arctic Circle. The mine is operated by Teck Cominco Alaska, Inc. ("Cominco") in partnership with the Northwest Arctic Native Association ("NANA")[1] on lands owned by NANA. Operating 365 days

[1] NANA is a regional corporation established by Congress pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. NANA is the regional corporation organized for the benefit of the Inupiat Eskimos residing in Northwest Alaska.

a year, the mine is the largest private employer in the Northwest Arctic Borough, a vast and isolated area with an historically high unemployment rate. Due to its remote location, the mine requires an independent, on-site power source. The mine is currently powered by six diesel-fired electric generators, designated "MG-1' through "MG-6," which were constructed pursuant to PSD permits issued by ADEC in 1988 and 1994.

In April 1996, Cominco initiated a project to boost the mine's output—and in the process create nearly 100 new jobs. Because the project required the use of more electricity, Cominco in June 1998 submitted an application to ADEC for a new PSD permit, requesting permission to increase the amount of nitrogen oxide ("NOx"), a precursor to nitrogen dioxide, from its MG-5 generator. Cominco's application proposed the use of "Low NOx"—a process that reduces the amount of NOx that would otherwise be released into the environment—as BACT for the MG-5 generator. In April 1999, Cominco amended its application, proposing to install Low NOx on all six of its existing generators—including the five not subject to a new BACT determination—as well as on a proposed new generator, "MG-17," which—like MG-5—was also subject to BACT.

In May 1999, ADEC issued a draft PSD Permit and a preliminary Technical Analysis Report ("TAR") in which it accepted Cominco's amended proposal because it would reduce *total* NOx emissions from the Red Dog Mine to a level comparable to or lower than that which would result were another control alternative evaluated during ADEC's review process—Selective Catalytic Reduction ("SCR")—installed on only the MG-5 and MG-17 generators. *See* App. 4a. ADEC published the draft PSD Permit and preliminary TAR for public comment and review.

In July 1999, after the close of the public comment period, the EPA commented on Cominco's application for the first

time, expressing its view that SCR was BACT for the MG-5 and MG-17 generators—even though SCR had never before been determined to be BACT to reduce NOx emissions from a similar diesel-fired electric generator. In September 1999, after considering all public comment—including the EPA's belated input—ADEC issued a final draft permit and a final draft TAR concluding that Low NOx was BACT for the MG-5 and MG-17 generators. In response to the EPA's continuing objections, ADEC worked with the federal agency in an effort to resolve their differences. Although the dispute over BACT for the MG-5 generator was resolved when Cominco decided to restrict emission increases from the generator to avoid BACT review, the parties could not agree on BACT for the proposed new generator, MG-17.

After a period of unsuccessful negotiations, ADEC on December 10, 1999 issued the PSD Permit and a final TAR, in which ADEC spent nearly ten pages explaining the basis of its carefully considered determination that Low NOx was BACT for the MG-17 generator. *See* PER 044-053.[2] In making that determination, ADEC considered the "energy, environmental, and economic impacts and other costs" associated with other technologies, including SCR. 42 U.S.C. § 7479(3). Moreover, although not required to do so, ADEC followed the EPA's "top-down" approach—used by the EPA when it acts as the PSD permitting authority in those circumstances where a State does not have a PSD program—in determining BACT.[3] Under that approach, ADEC (1) identified all NOx control technologies; (2) identified which technologies were technically feasible; (3) ranked the feasible control technologies in order of effectiveness; (4) considered the energy, environmental, and economic impacts of the feasible technologies and determined which to eliminate based on such impacts; and (5) selected Low NOx as the most effective technology not eliminated.

[2] Petitioners' Combined Excerpts of Record below are cited as "PER."

[3] As the EPA acknowledges, "top-down analysis is not a mandatory methodology." EPA 9th Cir. Br. 12 (quotation omitted).

In considering the "energy, environmental, and economic impacts and other costs" associated with SCR, ADEC discounted Cominco's contention that requiring SCR would have adverse environmental and energy impacts. ADEC concluded, however, that SCR would have an adverse economic impact because, among other things, the "excessive economic cost" of SCR—$2.9 million in capital costs and annual operating costs approaching $635,000—could adversely affect the mine's "world competitiveness," with attendant adverse consequences for the precarious economy of the Northwest Arctic Borough. PER 051. Accordingly, ADEC determined that SCR was not economically feasible. Yet because Cominco had agreed to install Low NOx on *all* its generators—not just the MG-17 generator subject to ADEC's BACT determination—ADEC's permit decision was expected to reduce NOx emissions to a level comparable to or *lower* than that which would result if SCR were installed on only the MG-17 generator. *See* App. 4a.

The EPA's Orders. In an attempt to prevent ADEC from issuing the PSD Permit to Cominco, the EPA on December 10, 1999 issued a Finding of Noncompliance and Order to ADEC. App. 26a. According to the EPA, ADEC's issuance of the final draft permit would not be in compliance with the requirements of the CAA or Alaska's SIP relating to the construction or modification of new or existing sources. App. 36a. The EPA thus ordered ADEC to withhold issuance of Cominco's permit designating Low NOx as BACT until ADEC demonstrated to the EPA's satisfaction that SCR was not BACT for the MG-17 generator or that the issuance of the permit was otherwise in compliance with the CAA and Alaska's SIP. *Id.*

The EPA purported to issue its Finding and Order under Section 113(a)(5) of the CAA, which provides that whenever

the Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources," the Administrator "may issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. § 7413(a)(5). The EPA also relied on Section 167 of the CAA, which provides that the Administrator "shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the CAA's PSD program]." *Id.* § 7477. The Finding and Order did not identify the specific "requirement" of the Act with which ADEC supposedly had failed to comply, and the Act itself specifies that "the permitting authority, on a case-by-case basis," is to determine what constitutes BACT for a particular facility. *Id.* § 7479(3).

Because ADEC had already issued Cominco's permit, the EPA—on February 8, 2000—issued an Administrative Order to Cominco prohibiting the construction of the MG-17 generator until Cominco "demonstrated to the EPA's satisfaction compliance with [the CAA]" and obtained a "valid" PSD permit from ADEC for the MG-17 generator that complied with the CAA and the EPA's December 10, 1999 Finding and Order. App. 49a. Subsequently, on March 7, 2000, the EPA amended its February 8, 2000 order to allow Cominco to perform certain construction activities during the short Alaska summer. App. 62a-63a. The Amended Administrative Order reiterated that Cominco was otherwise prohibited from commencing construction of the MG-17 generator. App. 62a.

Proceedings Below. ADEC and Cominco subsequently filed petitions for review in the Ninth Circuit challenging the EPA's authority to issue the December 10, 1999 Finding of Noncompliance and Order, the February 8, 2000 Administrative Order, and the March 7, 2000 Amended Administrative Order. App. 1a. ADEC and Cominco argued that the EPA had no authority to issue the orders under either Section 113(a)(5) or Section 167 because ADEC had not failed to comply with a "requirement" of the Act. To the contrary, they explained, ADEC had properly exercised its authority under the Act to make BACT determinations on a "case-by-case basis." 42 U.S.C. § 7479(3).

Before issuing its decision, the Ninth Circuit twice sought supplemental briefing from the parties. Shortly after oral argument, after initially rejecting the EPA's contention that the court lacked jurisdiction to consider the petitions because the EPA's orders did not constitute "final agency action," the Ninth Circuit requested further briefing "assessing the impact, if any," of this Court's recent decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001). App. 23a. Later, the court requested additional briefing on "whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual [PSD] permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP." App. 25a.

In the end, the Ninth Circuit upheld the EPA's orders. The court observed that applicants for PSD permits "must fulfill the 'preconstruction requirement' that a 'proposed facility [be] subject to the best available control technology for each pollutant subject to regulation.' " App. 8a (quoting 42 U.S.C. § 7475(a)(4)) (alteration in original). Thus, the court concluded, "subjecting a facility to BACT is both a 'requirement * * * of the chapter relating to the construction of new sources or the modification of existing sources,' under Section 113(a)(5), and a 'requirement[] of this part' under Section 167." *Id.* (alterations in original). "Because the EPA based its orders on the finding that ADEC had not complied with the BACT requirement," the court held, "the orders

were authorized by the plain language of Section 113(a)(5), as 'order[s] prohibiting the construction or modification of any major stationary source in any area to which such requirement applies,' and of Section 167, as orders 'necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." App. 9a.

The Ninth Circuit further held that the CAA's legislative history also compelled the conclusion that "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP." App. 10a-11a. As support for that conclusion, the court cited the 1970 amendment of the Act authorizing the EPA to publish NAAQs and delegating to the States the responsibility for implementing those standards; the 1977 amendment of the Act adding the Act's PSD provisions; and the 1990 amendment of Section 113(a)(5) allowing the EPA to take action when a State fails to comply with "any requirement or prohibition" relating to new or modified sources. *See* App. 9a-10a. The Ninth Circuit did not address the legislative history most directly on point—that making clear that "[t]he decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with *the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (1977) (emphasis added). *See* ADEC 9th Cir Br. 34 (citing legislative history).

Addressing ADEC and Cominco's contention that the EPA lacked the authority to veto ADEC's discretionary judgment based on its difference of opinion as to which technology was BACT, the Ninth Circuit stated that "neither Section 113(a)(5) nor Section 167 contains any exemption for requirements that involve the state's exercise of discretion," and that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." App. 11a. The court then went on to hold that the EPA's issuance of the orders was not arbitrary or capricious.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE ALLOCATION OF FEDERAL-STATE AUTHORITY.

The Ninth Circuit held in this case that "the EPA has the ultimate authority to decide whether [a] state has complied with the BACT requirements of the Act." App. 10a-11a. The CAA, however, squarely places the responsibility for determining BACT with the States, and gives them broad discretion to do so. *See* 42 U.S.C. § 7479(3) (defining BACT as "an emission limitation * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility") (emphasis added); *see also* S. Rep. No. 95-127, at 31 ("The weight assigned to such factors is to be determined by the State."). Because a BACT determination is a discretionary judgment, involving the case-by-case weighing of a variety of factors, there is no single, objectively "correct" BACT determination for any particular source. The fact that a State weighs the pertinent factors differently than the EPA in any particular case does not mean that the State has in any sense violated a requirement of the Act, authorizing the EPA to intervene and overturn the State's judgment.

The CAA does provide that a facility's emissions may not exceed the NAAQS or PSD allowable increments, *see* 42 U.S.C. § 7475(a)(3), and that the application of BACT may not result in emissions that exceed other standards established under the Act, *see id.* § 7479(3). As long as a State observes those statutory parameters—and it is undisputed that Alaska did so here—the only BACT "requirement" imposed by the Act is that a State take into account "energy, environmental, and economic impacts and other costs" in

determining BACT. If a State takes such factors into consideration—as Alaska plainly did here—the EPA has no authority to override a BACT determination with which it may disagree.[4] The Ninth Circuit's holding to the contrary is thus not only deeply flawed, but fails to square with decisions of this Court and other federal courts of appeals that have recognized and respected the balance of power between the States and the federal government that Congress established under the Act.

1. More than twenty-five years ago, this Court recognized the CAA's "division of responsibilities" between the States and the federal government in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). In *Train*, the Court observed that the EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the Act to a *secondary* role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphasis added). As the Court explained, "[t]he Act gives the [EPA]

[4] The only circumstance—not applicable here—in which the EPA's approval of BACT is required is "in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title [42 U.S.C. § 7411] has been promulgated subsequent to August 7, 1977, for such source category." 42 U.S.C. § 7475(a)(8). This narrow exception proves the rule—that Congress otherwise did not intend the EPA to be the "ultimate authority" with respect to a State's BACT determination. App. 11a. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) (where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id.* (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id. See also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

2. Unlike the Ninth Circuit below, other federal courts of appeals have respected the "division of responsibilities" set out in the CAA and have firmly rebuffed attempts by the EPA to usurp authority that Congress has clearly reserved for the States. Not surprisingly, the Ninth Circuit's decision conflicts in this regard with numerous decisions of the D.C. Circuit—the court vested with exclusive jurisdiction over petitions for review of the EPA's promulgation of national standards, rules, and regulations under the CAA. *See* 42 U.S.C. § 7607(b)(1).

For instance, the Ninth Circuit's decision conflicts with the D.C. Circuit's recent decision in *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002), a case involving the States' authority to make determinations very much like the BACT determination at issue here. *American Corn Growers* involved the States' authority to determine the best available retrofit technology ("BART") for certain stationary sources under the Act. The Act requires the States to determine BART for particular sources and provides that in determining BART each State "shall" take into consideration five enumerated statutory factors. *See* 42 U.S.C. §§ 7491(b)(2)(A), (g)(2). The EPA promulgated a rule requiring the States to consider one of the factors on a regional, rather than source-by-source, basis. *See* 291 F.3d at 6. The D.C. Circuit invalidated the rule, holding that it was

"inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8. By dictating that the States make BART determinations in a particular manner, the EPA had impermissibly "constrain[ed] authority Congress conferred on the states." *Id.* at 9.

Just so here. The CAA gives the States broad authority to make BACT determinations for particular sources. By substituting its judgment for the State of Alaska's in this case, the EPA plainly "infringe[d] on [the State's] authority under the Act." *Id.* at 9. The Ninth Circuit's decision sanctioning that result cannot be reconciled with *American Corn Growers*.

The Ninth Circuit's decision also conflicts with the D.C. Circuit's decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980), the seminal case addressing the CAA's PSD provisions. Amid various challenges to the EPA's initial regulations implementing those provisions, the court addressed the contention that the EPA should be required to promulgate guidelines "detailing the manner in which States may permit consumption of the available increments" of certain pollutants in clean air areas. *Id.* at 363-364. The court made clear that although the EPA may prevent or correct violations of the increment limitations under the Act, "the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments." *Id.* at 361. Those limitations must be observed, the Court held, "but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.* at 364.

In the same vein is the D.C. Circuit's more recent decision in *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (1997). There, the D.C. Circuit invalidated an EPA regulation requiring certain States to adopt particular motor vehicle emissions standards. Relying on this Court's decision in *Train*, the D.C. Circuit held that

"Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans." *Id.* at 1410. In sharp contrast to the D.C. Circuit's decisions in *Alabama Power* and *Virginia* v. *EPA*, the Ninth Circuit's decision permits the EPA to "dictate to the States" a matter plainly within their discretion—what constitutes BACT with respect to a particular facility.

3. The conflict between the decision below and the decisions of the D.C. Circuit alone provides a compelling basis for review. But the conflict created by the decision below is by no means limited to the D.C. Circuit. For instance, in *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579 (1981), the Fifth Circuit rebuffed the EPA's attempt to require the State of Florida to include a particular provision in its SIP. Florida had submitted a proposed SIP revision to the EPA to allow a particular source to increase its emissions limitations beyond those in Florida's EPA-approved SIP. The EPA approved the SIP revision, but imposed a two-year limit on the increase. Relying on *Train*, the Fifth Circuit held that the EPA's action was clearly "beyond the Congressional mandate." *Id.* at 589. Under the CAA, the court explained, States " 'may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.' " *Id.* at 587 (quoting *Train*, 421 U.S. at 80). "The great flexibility accorded the states," the court went on, "is further illustrated by the sharply contrasting, narrow role to be played by EPA." *Id.* So long as a proposed SIP revision meets the criteria set out in the Act, the EPA has no authority to " 'assume control of a State's emission limitations mix once its initial plan is approved.' " *Id.* (quoting *Train*, 421 U.S. at 80). By attempting to do just that, the EPA had "usurp[ed] state initiative in the environmental realm," thereby "disrupt[ing] the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act." *Id.* at 589.

The Seventh Circuit's decision in *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984) (Posner, J.), is to the same effect. There, too, the court refused to allow the EPA to tread upon the States' authority under the CAA and upset the Act's "division of responsibilities." *Train*, 421 U.S. at 79. The EPA had issued an order partially approving a proposed SIP revision submitted by the State of Michigan. The effect of the "partial approval," however, was to render the proposed SIP revision more stringent than it was as submitted. The Seventh Circuit held that the EPA could not, "in the guise of partial approval," make Michigan's SIP stricter than the State intended. *Id.* at 1036. If the EPA wished to impose tougher standards, it was required to follow the Act's procedures for doing so—namely by promulgating its own regulation in accordance with the Act's criteria. *See id.* at 1035. Under the CAA, the court explained, "[t]he federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends." *Id.* at 1036. In short, the CAA "creates a partnership between the states and the federal government," and the EPA "may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Id.*

The Ninth Circuit's decision allowing the EPA to "usurp state initiative in the environmental realm," *Florida Power & Light Co.*, 650 F.2d at 589, is squarely at odds with these decisions. Moreover, as the Seventh Circuit's decision in *Bethlehem Steel* makes clear, when the EPA prefers that a State take a particular action, the EPA must follow proper procedures. As ADEC explained below, the proper recourse for the EPA in this case was not to veto the State's discretionary judgment by regulatory fiat, but rather to participate in the public comment process on Cominco's draft permit and then, if it still disagreed with the State's action after that process, challenge ADEC's BACT determination through the

State's administrative review process. *See* ADEC 9th Cir. Br. 53-56; PER 390-391. *See also* 42 U.S.C. § 7475(a)(2) (requiring opportunity for interested persons "including representatives of the Administrator" to submit comments on "control technology requirements" before PSD permit may be issued). Alaska's laws and SIP permit any party that participated in the public comment process to pursue an administrative appeal of a permit decision, followed by judicial review. *See* 18 Alaska Admin. Code § 50.315; Alaska Stat. § 46.14.200.

Contrary to *Bethlehem Steel*, the Ninth Circuit permitted the EPA to bypass those channels and "run roughshod" over the State's prerogatives under the Act. 742 F.2d at 1036. The Ninth Circuit's decision is particularly intolerable as it essentially gives the EPA free rein to invalidate a BACT determination at any time—months, even years, after a permit has been issued and a source has invested in the technology approved by the State. *Cf. United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994) (holding that the EPA could not "mount a collateral attack" on a permit as many as five years after it was issued where the EPA had the "alternative remedy" of a state administrative appeal followed by judicial review). The conflict between the decision below and *Bethlehem Steel* in this regard further underscores the need for this Court's review.

II. THE CONFLICT OVER FEDERAL-STATE AUTHORITY IS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

Although the conflict engendered by the Ninth Circuit's decision alone warrants certiorari, the need for this Court's review is heightened by the important and recurring nature of the question presented. Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light*, 650 F.2d at 587, including the preservation of air quality in clean air areas. As the D.C. Circuit explained in

Alabama Power, "[i]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." 636 F.2d 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id.* at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress's decision to make BACT "strictly a State and local decision," *id.*, makes sense, as it is the States—not the EPA—that are most sensitive to particular local needs and concerns.

The Act's requirement that BACT be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations. In this case, for instance, the State of Alaska, taking into account the requisite statutory factors, made a permitting decision that would not only result in cleaner air, but more jobs for a struggling community situated 100 miles north of the Arctic Circle, where geography and the harsh environment pose unique employment challenges and offer few employment alternatives. In reaching its decision, the State considered various site-specific conditions, as well as "the importance of the mine to the regional economy of the Northwest Arctic Borough." PER 387. *See id.* 386-387.

The Ninth Circuit, based more than 2000 miles away in California, was "uncomfortabl[e]" with the State's consideration of the mine's importance to the local economy. App. 16a. But the statute specifically directs that the States

consider "economic impacts" in determining BACT. 42 U.S.C. § 7479(3). *See* S. Rep. No. 95-127, at 31. Allowing the EPA to dictate BACT to the States means allowing the EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent with" the limitations set out in the Act. *Train*, 421 U.S. at 80. It also means longer delays in the permitting process while the EPA wrangles with the States over their decisions. That is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's decision not only vitiates the States' authority to determine BACT under the CAA, but also threatens the ability of the States to make numerous similar kinds of discretionary decisions under the Act. As noted above, for instance, the Act authorizes the States to determine the best available retrofit technology ("BART") for particular sources by weighing various statutory factors. *See* 42 U.S.C. § 7491(b)(2)(A); *id.* § 7491(g)(2). The Act also authorizes the States, in consultation with the EPA, to exclude from the definition of "small business stationary sources" under the Act's operating permit provisions any category of sources that "the State determines to have sufficient technical and financial capabilities to meet the requirements of [the] Act." *Id.* § 7661f(c)(3)(B). In non-attainment areas, the Act authorizes the States to determine the lowest achievable emissions rate ("LAER") for new and modified major stationary sources. *See id.* §§ 7501(3), 7503(a)(2). Under the Ninth Circuit's holding, the EPA would be free to override these sorts of determinations any time it disagrees with a State's decision.

The potential effect of the Ninth Circuit decision is even more far-reaching. In addition to the CAA, numerous other statutes embody the principle of "cooperative federalism."

See, e.g., New York v. *United States*, 505 U.S. 144, 167-168 (1992) (noting "numerous federal statutory schemes" of this nature, including the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*). Those statutes also establish regulatory regimes based on shared federal-state responsibility, whereby the federal government sets standards and the States—if they opt to undertake the responsibility—are given broad flexibility in implementing those standards. Such programs "offer States the choice of regulating * * * activity according to federal standards," which promotes underlying values of federalism because "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York* v. *United States*, 505 U.S. at 167-168. The Ninth Circuit decision, by transferring from the State to the EPA core discretionary authority under one of the leading "cooperative federalism" statutory regimes, threatens to undermine the balance of power struck by Congress and accepted by the States when they assumed the responsibilities offered under the Act. This Court should not allow such a troubling decision to stand unreviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70169, 00-70175 and 00-70301.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL M. BROWNER, ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Argued and Submitted Feb. 13, 2001.
Submission Vacated March 27, 2001.
Resubmitted July 30, 2002.
Filed July 30, 2002.

Before: REINHARDT, WARDLAW, and GOULD, Circuit Judges.

WARDLAW, Circuit Judge.

The Alaska Department of Environmental Conservation ("ADEC") and Teck Cominco Alaska, Inc. ("Cominco") petition for review of three enforcement orders entered by the United States Environmental Protection Agency ("EPA"), which effectively invalidated a Prevention of Significant Deterioration ("PSD") permit issued by ADEC to Cominco. Petitioners challenge the EPA's authority to issue these orders, and argue that the EPA abused its discretion in finding that ADEC's Best Available Control Technology ("BACT") determination did not comply with the requirements of the Clean Air Act and Alaska's State Implementation Plan ("SIP"). We find that the EPA acted within its authority and, further, that it did not abuse its discretion.

I. Background

The Clean Air Act ("the Act"), 42 U.S.C. §§ 7401-7671q, establishes a program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. The Act requires states to submit for the EPA's approval a state implementation plan that provides for attainment and maintenance of the national ambient air quality standards ("NAAQS") promulgated by the EPA. 42 U.S.C. § 7410.

The Act's Prevention of Significant Deterioration program controls the level of degradation in "clean air areas" of the nation by requiring a pollutant-emitting source to obtain a permit before construction. *See* 42 U.S.C. §§ 7470-7492. In implementing the PSD program and permitting process, states can either operate within the federal PSD program, in which the EPA is the PSD permit issuer, or include a PSD program within their own EPA-approved state implementation plan. 42 U.S.C. §§ 7410(a)(2)(C), 7471.

Alaska is a "clean air area" under the Act—that is, its air quality regions are cleaner than the national standards with respect to ozone and nitrogen dioxide. Under Alaska's State Implementation Plan, which the EPA accepted as meeting the Act's requirements in 1983, Alaska, through the Alaska Department of Environmental Conservation, is the PSD permit issuer. *See* Approval and Promulgation of Implementation Plans; Alaska, 48 Fed. Reg. 30623 (July 5, 1983), as amended at 56 Fed. Reg. 19284 (April 26, 1991). For new and modified sources, the Alaska SIP requires "a demonstration that the proposed [emissions control] limitation represents the best available control technology" before ADEC will issue a permit. Alaska Admin. Code tit. 18, § 50.310(d)(3) (1997).

Cominco operates the Red Dog Mine facility ("the Mine"), a major producer of zinc concentrates, in partnership with the Northwest Arctic Native Association, an Alaska corporation. The Mine is approximately 100 miles north of the Arctic Circle and about five miles west of the Noatak National

Preserve. The closest residential communities are the native villages of Kivalina and Noatak.

Due to its remote location, the Mine requires an independent, on-site power source. The current power supply for the Mine consists of six diesel-fired Wartsila 5000-watt generators, labeled "MG-1" through "MG-6," which were constructed under a 1988 PSD permit. In April 1996, Cominco began its Production Rate Increase ("PRI") project to boost the Mine's output of zinc and zinc concentrates. Cominco determined it needed more electricity at the Mine to power the additional mining equipment.

In June 1998, Cominco submitted an application to ADEC for a new PSD permit, requesting permission to increase the amount of nitrogen oxides ("NOx"), a regulated air pollutant, from its MG-5 generator. Cominco's application proposed the use of "Low NOx" as BACT for MG-5. Low NOx is a process that uses high-combustion air temperatures to better atomize toxic particles, thereby reducing the amount of NOx released into the environment. A review by ADEC, however, reached the contrary conclusion that Selective Catalytic Reduction ("SCR"), a process in which exhaust is injected with ammonia or urea and then combined with a catalyst, was BACT for MG-5.

Cominco responded by amending its application in April 1999. As an alternative to installing SCR on MG-5, Cominco volunteered to install the less costly Low NOx technology on all six of its existing generators, including those not subject to BACT standards, and on a proposed seventh generator, "MG-17."

In its May 4, 1999 Preliminary Technical Analysis Report, ADEC accepted Cominco's proposal because it would reduce the total NOx output from the Mine to a level comparable to that which would result were SCR installed in only the MG-5 and MG-17 generators.

In July 1999, the EPA entered the discussion over Cominco's application at the urging of the National Park Service, which had expressed concern that the "[n]itrogen

oxide emissions . . . could affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve." In a letter to ADEC, the EPA stated that SCR was the best available control technology for the MG-5 and MG-17 generators, and that "the PSD program does not allow the imposition of a limit that is less stringent than BACT even if the equivalent emission reductions are obtained by imposing new controls on other emission units."

On September 3, 1999, ADEC issued a Final Technical Analysis Report and permit decision, concluding that SCR was not economically feasible and that Low NOx was instead BACT. The EPA responded with a review of ADEC's report, asserting that ADEC's cost-effectiveness estimate for SCR was "well within the range that the EPA considers reasonable," and that Cominco had not adequately demonstrated why SCR was economically infeasible.

ADEC, Cominco, and the EPA met to discuss the pending PSD permit, agreeing to install Low NOx on MG-1, MG-3, MG-4, and MG-5, but without agreeing on BACT for MG-17.

After further unsuccessful negotiations, the EPA issued a "Finding of Noncompliance Order" on December 10, 1999, stating that ADEC's authorization of Cominco's construction and installation of new equipment was not in compliance with the Clean Air Act and the Alaska SIP. Pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, the EPA ordered ADEC to withhold issuance of Cominco's PSD permit.

Later that same day, however, in disregard of the EPA's order, ADEC issued the PSD permit along with a second Final Technical Analysis Report.

On February 8, 2000, the EPA sent a letter to ADEC with a formal finding that the December 10, 1999 report and PSD permit failed to comply with federal and state PSD requirements. On the same day, the EPA issued a second order to Cominco preventing the company from beginning construction on the MG-17 generator until Cominco had demon-

strated to the EPA's satisfaction compliance with the Act and the SIP.

The EPA's third order, dated March 7, 2000, modified the February 8, 2000 order to allow Cominco to engage in summer-dependent construction activities.

On April 25, 2000, the EPA withdrew its December 10, 1999 order prohibiting ADEC from issuing the permit. In an accompanying letter, however, the EPA emphasized that its findings of noncompliance in the December 10, 1999 and February 8, 2000 orders remained unchanged.

ADEC and Cominco petition this court for review of the December 10, 1999 Finding of Noncompliance and Order; the February 8, 2000 Administrative Order; and the March 7, 2000 Amended Administrative Order. Petitioners claim that the EPA exceeded its authority by issuing enforcement orders invalidating ADEC's issuance of Cominco's PSD permit, and that ADEC acted within its discretion when making its BACT determination.

II. Procedural History on Appeal and Jurisdiction

The EPA initially challenged our subject matter jurisdiction in a motion to dismiss, which we denied without prejudice, and again in conjunction with the merits of the appeal. In an order dated March 27, 2001, *Alaska v. United States EPA*, 244 F.3d 748 (9th Cir. 2001), we determined that we have jurisdiction pursuant to Section 307(b)(1) of the Clean Air Act because the EPA's Administrative Orders to ADEC and Cominco constitute final agency action. 42 U.S.C. § 7607(b)(1) (granting jurisdiction to review final actions of the Administrator). Applying the test in *Bennett v. Spear*, 520 U.S. 154 (1997), we held that the EPA's actions were final for the purposes of appellate review because the EPA's findings represented its "final position on the factual circumstances," the orders had determined the rights and obligations of the parties, and legal consequences would follow if Cominco chose to disregard the orders and commence construction. *Alaska,* 244 F.3d at 750.

To address Petitioners' contention that the record was incomplete, we also directed the EPA to submit a complete administrative record, withdraw its orders, or file an action in district court. The EPA submitted a declaration that the record was, in fact, complete. On August 3, 2001, we directed Petitioners to respond to the EPA's declaration. In their responses, all the parties effectively agreed that the record as it stood was adequate to resolve the issues on appeal.

On February 28, 2002, in light of the parties' agreement as to the completeness of the record, we requested supplemental briefing on the question of the EPA's authority to issue the orders. Having resolved these preliminary disputes, we now turn to the merits of the appeal.

III. Authority of the EPA

We agree with the EPA that the plain text, structure, and history of the Act compel the conclusion that the administrative orders fell within the EPA's enforcement and oversight authority.

Under the traditional method of statutory construction, the interpretation of a statute "begin[s] with the plain meaning of its language." *In re Bonner Mall Partnership*, 2 F.3d 899, 908 (9th Cir. 1993). "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted).

The EPA's enforcement powers are outlined in Section 113(a)(5), 42 U.S.C. § 7413(a)(5), and Section 167, 42 U.S.C. § 7477, of the Act.

Section 113(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with [42 U.S.C. § 7413(d)], or
>
> (C) bring a civil action under [42 U.S.C. § 7413(b)].

42 U.S.C. § 7413(a)(5). The referenced "chapter" includes the PSD permit program in "Part C—Prevention of Significant Deterioration of Air Quality." *See* 42 U.S.C. § 7475; H.R. Rep. No. 101-490(I), pt. 10, at 391 (1990) (Section 113(a)(5) "authorizes enforcement actions where a State is not acting in compliance with any requirement of Part C or Part D of Title I.").

Under Section 167, the Administrator "shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part. . . ." 42 U.S.C. § 7477. "This part" refers to Part C, which establishes the PSD program.

The PSD program is implemented through a permitting system for new and modified "major emitting facilities" in clean air areas. 42 U.S.C. §§ 7475, 7479(1). To receive a permit, the applicant must fulfill the "preconstruction requirement" that a "proposed facility [be] subject to the best available control technology for each pollutant subject to regulation. . . ." 42 U.S.C. § 7475(a)(4). Thus, subjecting a facility to BACT is both a "requirement . . . of the chapter relating to the construction of new sources or the modification of existing sources" under Section 113(a)(5), and a "requirement[ ] of this part" under Section 167. *See* S. Rep. No. 95-127, at 12 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1386 (Comm. Print 1978) ("[T]here is a national requirement that each new major facility to be located in a clean air area install the best available control technology.").

BACT is defined in Section 169(3) as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . .

42 U.S.C. § 7479(3). Here, ADEC, as the "permitting authority," made the initial BACT decision. Because the EPA based its orders on the finding that ADEC had not complied with the BACT requirement, the orders were authorized by the plain language of Section 113(a)(5), as "order[s] prohibiting the construction or modification of any major stationary source in any area to which such requirement applies," and of Section 167, as orders "necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part."

The structure and legislative history of the Act further support the EPA's authority to issue the enforcement orders. Since the original Clean Air Act of 1963, state and local governments have had "primary responsibility" for "the prevention and control of air pollution at its source." *Train v. NRDC*, 421 U.S. 60, 64 (1975); 42 U.S.C. § 7401(a)(3). Following disappointing state response to air pollution concerns, Congress has consistently increased over time federal authority in pollution control.

In 1970, Congress amended the Act, Pub. L. 91-604, 84 Stat. 1676, "in order to assure that the requirements of the act would be met if the State failed to adopt, implement, or enforce the necessary measures." S. Rep. No. 95-127, at 326 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1405; *see Train*, 421 U.S. at 64. Fundamentally restructuring the Act "to create an aggressive federally-orchestrated program for air pollution control," the amendments directed the EPA to publish NAAQS and the states to develop implementation plans to meet them. William V. Luneburg, *Clean Air Act Implementation and the Impact of Whitman v. American*

Trucking Associations, Inc., 63 U. Pitt. L. Rev. 1, 5 (2001); 42 U.S.C. § 7410(a)(1).

In 1977, when it became clear that many areas of the country would not attain the NAAQS by the 1970 Amendments' statutory deadline, Congress extended the deadline and amended the Act, dividing the country into nonattainment areas and clean air areas, and establishing the Prevention of Significant Deterioration program to prescribe allowable levels of air quality degradation in clean air areas. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67, 76 (2001). Congress recognized that the states experienced internal industry "pressure . . . to relax their standards with the threat of industrial relocation in other, more permissive States." S. Rep. No. 95-127, at 136-37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1215. Overarching federal leadership provided "protection for States exercising their right to maintain clean air." *Id.*

The 1990 Amendments strengthened the EPA's enforcement authority in cases where states fail to enforce SIPs or permit requirements. *See* H.R. Rep. No. 101-952, at 348, 358 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3731, 3741. Amendments to Section 113(a)(5) extended enforcement authority to include not only failure to comply with state implementation plan provisions, but also a state's failure to comply with "any requirement or prohibition" of the Act relating to new or modified sources. H.R. Rep. No. 101-490(I), pt. 10, at 391.

Thus, although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination. *See* H.R. Rep. 95-564, at 152 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 533 (Comm. Print 1978) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."). Therefore, based upon the plain language and the legislative history of the Act and amendments to it, we hold that the EPA has the

ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP.

ADEC and Cominco contend that the EPA exceeded its authority in issuing the three administrative orders predicated on a finding that ADEC's BACT determination was inadequately justified. They argue that because Section 169(3) gives ADEC, the "permitting authority," discretion to determine BACT, the EPA lacked authority to veto ADEC's judgment based on a mere difference of opinion as to which technology was BACT.

This argument is without merit because neither Section 113(a)(5) nor Section 167 contains any exemption for requirements that involve the state's exercise of discretion. Nothing in the BACT definition of Section 169(3) limits the EPA's authority. It does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute.

Petitioners further contend that the EPA's authority extends only to determining whether ADEC satisfied what they term "objective requirements" listed in the Act and the SIP. However, it is not clear what Petitioners mean by "objective requirements," as opposed to, presumably, discretionary requirements. Instead of defining such requirements, Petitioners offer a non-exhaustive list, including: the requirement of a PSD permit, the inclusion of a BACT determination in the permit, compliance with federally set limits on emissions, and consideration of energy, environmental, economic, and other costs. Whereas failure to comply with any of the foregoing objective requirements would justify the EPA's issuance of enforcement orders under Sections 113(a)(5) and 167, Petitioners argue, the state's BACT determination itself is not subject to EPA approval or veto.

In support of this distinction, Petitioners cite *United States v. Solar Turbines, Inc.*, 732 F. Supp. 535 (M.D. Pa. 1989), in which the district court analyzed whether a source's actions constituted a violation of the Act:

> [A] violation is to be assessed against objective standards, namely the source's failure to apply for a permit or receive a permit prior to construction; failure to supply information requested of it by the issuing authority, or failure to comply with specific quantifiable air quality standards or restrictions on emission levels.

Id. 539. However, this case sheds no light on Petitioners' argument because it examined the requirements that a *source* must meet under the Act. Here, the question presented is what requirements the *state* must meet.

In a move that seems to undermine their position, Petitioners also quote a Legal Opinion by the EPA's Office of General Counsel to define what they mean by "objective requirements:"

> [I]n the case of a decision applying best available control technology (BACT) under Section 165(a)(4) for PSD, if a state has met all procedural norms, considered all available control technologies, *and given a reasoned justification of the basis for its decision*, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards.

(emphasis added).

As the emphasized portion demonstrates, this Opinion actually supports the EPA's authority to determine the reasonableness or adequacy of the state's justification for its decision, which is exactly what the EPA did here. The cover letter to the December 10, 1999 Finding of Noncompliance and Order stated the EPA's belief that:

> ADEC's own analysis supports the determination that BACT is selective catalytic reduction (SCR) . . . ADEC's decision in the proposed permit therefore is both arbitrary and erroneous. . . . [T]he State's record reflects that the cost-effectiveness and the collateral issues of energy, environmental, or economic impacts, and other costs, do not justify failure to select SCR as BACT in this case.

Whatever Petitioners mean by "objective requirements," they must concede that the provision of a reasoned justification is one of them. We conclude, therefore, that the EPA had the authority to issue findings and orders on the ground that the State failed to provide an adequate justification for its BACT decision.

IV. Validity of the Orders

Petitioners alternatively argue that the EPA erred in finding that ADEC was not in compliance because ADEC's BACT determination fulfilled all requirements of the Act. The EPA maintains that ADEC's determination that Low NOx was BACT was "nothing short of incomprehensible, unreasoned, and unsupported."

Under the Act, we may reverse a final action by the EPA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Upon review of the administrative record, we conclude that the EPA did not act arbitrarily or capriciously in issuing its Findings of Noncompliance and Orders prohibiting construction of the MG-17 generator until ADEC produced a valid PSD permit.

A common approach to determining BACT is the "top-down" method, which ADEC purported to apply. Under this method, as detailed in the EPA's *New Source Review Workshop Manual* (1990), the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable. *Citizens for Clean Air v. United States EPA*, 959 F.2d 839, 845-46 (9th Cir. 1992). If the top choice is eliminated, then the next most stringent alternative is considered, and so on. The most effective control option not eliminated is BACT. *Id.*

Although the top-down approach is not mandated by the Act, if a state purports to follow this method, it should do so

in a reasoned and justified manner. ADEC's December 10 Technical Analysis Report rejected SCR because it would have adverse economic impacts on the Red Dog Mine. The report states that there are several situations in which a permitting authority can reject a control option for economic considerations: (1) when the applicant, i.e., Cominco, shows that the costs of the control are disproportionately high compared to the cost of control in recent permit decisions; (2) when the cost-effectiveness of the control is outside the range of costs being borne by similar sources in recent BACT determinations; and (3) when the applicant shows the cost of the control option will cause adverse economic impact to the facility.

ADEC's report demonstrates, however, that none of these situations were present. As to the first situation, the report reveals that there were no recent permit decisions involving BACT determinations for diesel engines used as primary power generators.

As to the second, the cost-effectiveness of recent NOx control BACT decisions ranged from $0 to $7,000 per ton of NOx removed. According to ADEC's estimate, the cost-effectiveness of SCR was $2,100 per ton of NOx removed, a cost well within the applicable range.

Finally, ADEC attempted to determine whether the costs of SCR would be excessive by analogizing the costs of the MG-17 generator to the costs of other electric utilities. ADEC began with the assumption that SCR for MG-17 would cost 3 cents per kilowatt-hour. It reasoned that if Cominco "did not have a powerhouse, it would probably buy power from a rural Alaska utility. From a cursory review, it appears that the average cost of electricity in rural-Alaska is approximately 15¢ per kilowatt hour." Because a 3¢ increase would "be equivalent to a 20% increase in the electric rate of the facility," ADEC concluded that "this is a disproportionate cost increase when viewed as an electric utility."

This rationale is unfounded, however, because Cominco does not, in fact, buy power from an electric utility. Therefore, the use of the 15¢ figure is not justified. ADEC itself

acknowledges the flimsiness of its own hypothetical in the report:

> Another perhaps better way to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine.

ADEC's report demonstrates that Cominco failed to show that any of the situations in which a control option can be rejected for cost considerations was applicable. Rather than concluding, logically, that Cominco had failed to show that SCR could be eliminated, ADEC instead invented its own reason for the economic infeasibility of SCR. ADEC described the Mine's "dramatic" reversal of unemployment rates in its borough:

> Before the Mine opened in 1990, borough wages were well below state average wages. . . . The Mine now provides high paying year round employment. . . . Cominco's contractors, vendors, and wages have boosted the borough's private sector economy. . . . With government support and endorsement of Cominco's operations, including the Production Rate Increase Project, the Red Dog Mine will continue to influence and benefit the residents and economy of this region.

ADEC concluded that it had chosen, as the "foremost consideration to judge economic impacts of SCR," the "direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts." To "support Cominco's [PRI Project] . . . and its contributions to the region," ADEC rejected SCR "based on excessive economic cost—$2.9 million capital cost, with annualized costs approaching $635,000." The report fails to explain how the costs of SCR would affect the Mine's world competitiveness or why the capital cost is excessive.

ADEC's apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy—is not an accepted justification in the top-down approach. Worse still, it is uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits. *See* S. Rep. No. 95-127, at 136.

Because ADEC's report shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) ADEC failed to provide a reasoned justification for its elimination of SCR as a control option, the EPA did not act arbitrarily and capriciously in concluding that ADEC abused its discretion by making an internally inconsistent and unreasonable BACT determination. The petition for review is therefore

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70301, 00-70169, 00-70175.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMINCO ALASKA, INC., AN ALASKA CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTIE WHITMAN,* ITS ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMINCO ALASKA, INC., AN ALASKA CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTIE WHITMAN, ITS ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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* Pursuant to Fed. R. App. P. 43(c), Christie Whitman is automatically substituted as a party respondent for Carol Browner.

Argued and Submitted Feb. 13, 2001
Filed March 27, 2001

Before: REINHARDT, WARDLAW and GOULD, Circuit Judges.

ORDER

The Alaska Department of Environmental Conservation ("ADEC") and Cominco Alaska, Inc. ("Cominco") petition this Court for review of three enforcement orders (the "Orders") entered by the United States Environmental Protection Agency ("EPA"), which effectively invalidated an air quality construction permit issued by ADEC for the construction of a power generator at Cominco's Alaskan mining facility located about 100 miles above the Arctic Circle. Petitioners challenge the EPA's authority to invalidate the permit under federal and state law. The EPA asserts that it has the authority to regulate such construction under the Clean Air Act ("CAA" or the "Act") and further claims that this Court lacks subject matter jurisdiction to consider ADEC's and Cominco's petitions because the Orders are not "final agency action" subject to review in the United States Courts of Appeal.

We first consider the question of our jurisdiction to review the Orders. The parties agree that we have jurisdiction, if at all, pursuant to section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), which gives the Court jurisdiction over "any . . . final action taken, by the Administrator." The EPA argues that none of the Orders constitutes final agency action and thus none is reviewable.

Each of the Orders is predicated on the EPA's position that the Best Available Control Technology ("BACT") for the proposed new Wartsila generator MG-17 at Cominco's Red Dog Mine facility is Selective Catalytic Reduction as opposed to Low NOx emission reduction, a less costly technology proposed by Cominco and approved by ADEC. In its "Finding of Noncompliance and Order" dated December 10, 1999, the EPA found that the Low NOx emission control for MG-17 does not comply with the CAA or the Alaska State Implementation Plan ("SIP") for the CAA. Pursuant to 42 U.S.C. §§ 7413(a)(5) and 7477, the EPA ordered ADEC to withhold issuance of its proposed Prevention of Significant Deterioration ("PSD") permit for Cominco. Concluding that Low NOx was the appropriate BACT for the MG-17 generator, ADEC, shortly after receiving the December 10, 1999 Order, issued the final PSD permit. In a second order directed to Cominco dated February 8, 2000, finding it "necessary to prevent any further construction or modification at the Red Dog mine facility," the EPA prohibited Cominco from commencing any and all construction or modification activities at the Red Dog Mine facility associated with the Wartsila generator MG-17. The EPA's third order, dated March 7, 2000, modified the February 8, 2000 Order to accommodate the unique weather-related construction limitations present at the Red Dog Mine site and allowed certain preliminary summer construction activities. On April 25, 2000, the EPA withdrew its December 10, 1999 Order directed to ADEC, in light of ADEC's issuance of the construction permit after it received the order, noting that "the Order does not impose any continuing prohibitions or obligations to ADEC." In an accompanying letter, however, the EPA Deputy Regional Administrator stated:

> EPA still believes that the final PSD permit issued to Cominco is not in compliance with the Clean Air Act or the Alaska SIP. Region 10 is withdrawing only the Order portion of the December 10, 1999 document. Thus, the December 10, 1999 and February 8, 2000 Findings under Section [7413(a)(5)] remain unchanged, as does the March 7, 2000 Order issued to Cominco.

ADEC and Cominco petitioned for review of the Orders. Respondents, the EPA, Christie Whitman, and Chuck Clarke, Regional Administrator, Region 10, move to dismiss the petitions for lack of subject matter jurisdiction. The EPA

asserts that the Administrative Orders issued to Cominco and ADEC do not constitute the "final action of the Administrator." In *Bennett v. Spear*, 520 U.S. 154 (1997), recently reaffirmed in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), the Supreme Court explained that two conditions must be satisfied in order for agency action to be "final" for purposes of appellate review: the action must mark the "consummation" of the agency's decision-making process, and it must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citation and quotations omitted).

Like the Supreme Court in *Bennett* and *American Trucking*, we have little trouble concluding, especially in light of the representations as to the EPA's position made in oral argument by its counsel, that both *Bennett* conditions are met here. The EPA argues that the Orders are not a "final action," although the findings in the Orders are its "last word" on its position as to Selective Catalytic Reduction as BACT for MG-17 and Cominco is in legal jeopardy if it fails to comply with the Orders. The EPA contends that because it has not actually commenced an enforcement action, the Orders are not subject to review. There is, however, no question that the EPA asserted its final position on the factual circumstances upon which the Orders are predicated: It is EPA's position that if Cominco builds the MG-17 generator using Low NOx it would be in violation of the Act, the Alaskan SIP, and its Orders. The EPA's position is unalterable; according to counsel, it would change only if the circumstances surrounding the construction of MG-17 change.

The "rights or obligations" of the parties have been determined by these Orders. As paragraph No. 49 of the Findings of Fact in the February 8 Order states, the EPA found it "necessary" to issue the Order to "prevent any further construction or modification at the Red Dog mine facility." The EPA is right: The effect of the February 8 Order is to halt construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco.

Moreover, "legal consequences will flow," if Cominco chooses to disregard the Order and go forward with construction. As the EPA wrote in its Motion to Dismiss the Petition for Lack of Subject Matter Jurisdiction, "EPA could ask, and the district court could assess, penalties both for Cominco's alleged violation of the Act's PSD requirements and for any alleged violation of the order." At argument EPA counsel explained that the language "could" referred only to its decision to seek enforcement of its Orders and a district court's decision to enforce them. Thus the "could" language did not refer to a tentative conclusion as to the merits by the EPA, or to any ongoing EPA proceedings in that regard; it referred simply to whether the EPA would commence judicial proceedings to remedy what it views irretrievably as a violation of the Act. Under EPA's construction of its Orders, if it decides to institute such proceedings, Cominco and its employees would be subject to criminal and civil penalties for the violation of its Orders, as well as for the violation of the CAA.

Finally, our review will not benefit from further factual development of the record, as the principal issue before us is a legal question—whether it is the state, through ADEC, or the EPA which bears the ultimate responsibility and authority to decide what emissions reductions will be required from which sources, *see* 42 U.S.C. §§ 7410(a), 7411, and whether the EPA acted in an arbitrary and capricious manner in issuing the Orders based on the record before it at the time it made its decision that the use of Low NOx on MG-17 would violate the Act and the PSD provisions of the SIP.

Having determined that the Orders are final and that we have jurisdiction, we do not consider the merits at this time because in order to do so we require, as explained below, the submission of an appropriate administrative record as well as further briefing. Also, because the EPA argued to this Court that the Orders were not "final" and that it had not yet determined whether to seek enforcement in the district court, it seems appropriate to provide the Agency with a fair opportunity either to commence such an enforcement proceeding, as contemplated by 42 U.S.C. § 7413(b), or to

withdraw the Orders, before we proceed further with the petition for review. Thus, we express no view as to (a) whether the EPA has the authority under the CAA to invalidate the ADEC permit, or (b) if so, whether the EPA acted arbitrarily and capriciously in issuing the Orders. Accordingly, we order as follows:

Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justifications for the EPA's decisions to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions; or (3) file an enforcement action, pursuant to 42 U.S.C. § 7413(b), in the appropriate United States District Court.[1]

With respect to the first option, the record we would be called upon to review, should we decide that the EPA has the authority to overrule ADEC, is that upon which the EPA relied in its determination that Selective Catalytic Reduction, and not Low NOx, is the BACT for the MG-17. *See* 5 U.S.C. § 706; *Ober v. EPA*, 84 F.3d 304, 313-15 (9th Cir. 1996); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 597 (1980) (requiring a "meaningful record to review," which "fully comports with the traditional role of appellate courts in reviewing agency decisions that are based on development of factual issues by means of an administrative record"). To the extent necessary to provide a full and complete administrative record of the basis for the agency's final decision and the Orders, the EPA must produce not only documentary evidence but also affidavits of the Administrator or her delegates as needed to permit review. *See Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Citizens to*

[1] An enforcement action in the appropriate United States District Court in our view may provide a preferable means of resolving the issues in this case, for the parties in that context will be able to develop a full record on pertinent issues.

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21 (1971) (holding that "since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard"), *overruled on unrelated grounds by Califano v. Sanders*, 430 U.S. 99, 105 1977). Communications setting forth and evaluating alternatives to the Orders must also be included.

Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pages, assessing the impact, if any, of *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations.

The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until further notice by this Court.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70169, 00-70175 and 00-70301

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER, ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Filed Feb. 28, 2002

Before: REINHARDT, WARDLAW and GOULD, Circuit Judges.

ORDER

Having considered the recent submissions of the parties agreeing to the factual record on appeal and the briefs filed beginning in June 2000 (almost two years ago), we have determined that supplemental briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supplemental brief not to exceed twenty-five pages within twenty-eight days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP.

If any party desires additional oral argument in this matter, it should file a request, along with a brief statement of the reasons it believes additional argument is necessary.

It is so ORDERED.

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
State of Alaska Department of Environmental Conservation,	)	Docket No. CAA-10-99-0263
	)	FINDING OF NONCOMPLIANCE and ORDER
Proceeding under Sections 113(a)(5) and 167 of the Clean Air Act.	)	(42 U.S.C. §§ 7413 and 7477)

I. FINDING OF NONCOMPLIANCE and ORDER

1. This Finding of Noncompliance and Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to the State of Alaska, Department of Environmental Conservation (ADEC), pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue findings and orders pursuant to Section 113(a)(5) and Section 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator has consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance pursuant to the delegation of authority from the Administrator.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for

certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each air quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR and is in an area that is in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R. § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved as part of the SIP a State PSD program, implemented directly by the State, as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the

PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R. § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Ambient air" is defined at Alaska Statutes 46.14.99(2)(1993) as "that portion of the atmosphere, external to buildings, to which the general public has access."

11. "Actual emissions" as defined in 18 AAC 50.900(1)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

12. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

13. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

14. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation

or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from ADEC. The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. 18 AAC 50.900(9)(1991) defines "best available control technology" as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impacts, and other costs.

19. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;

(B) issue an administrative penalty order in accordance with subsection (d) of this section; or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

20. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

21. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

22. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

23. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit or if the facility is not subject to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

24. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red

Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

25. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

26. The Red Dog mine facility currently operates under the terms and conditions of Permit No. 9332-AA003, as amended December 4, 1996.

27. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

28. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without a permit.

29. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air

quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

30. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

31. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

32. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that, of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission hunt based on low NOx controls.

33. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

34. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as listed in 18 AAC 50.300(a)(6).

35. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

36. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). The Red Dog mine facility and production rate increase project are therefore a "facility," as listed in 18 AAC 50.300(a)(6)(C).

37. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

38. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledges are subject to BACT (MG-5 and MG-l7). SCR is BACT for the Wartsila diesel generators.

39. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

40. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

41. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit includes an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

42. The final draft PSD permit does not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposes to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit is listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

43. Neither the Final Technical Report nor the final draft PSD permit clearly identify or delineate the ambient air boundary for the Cominco Red Dog mine facility.

44. The Public Control Access Plan in final draft PSD permit Section 19 provides that public access to the mine site ambient air boundary is limited by sign postings placed along corridors of potential public access, specifically, at the main entrance to the operation on the southern boundary along the haul road, along Red Dog Creek, and at three sites around the boundary where the terrain may possibly accommodate public access.

45. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issuance of the permit as proposed in the September 3,1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted.

IV. FINDING OF NONCOMPLIANCE

46. Based on investigation and analysis of all relevant facts and documentation provided by Cominco and ADEC, pursuant to Section 113(a)(5) of the Clean Air Act, 42 U.S.C. § 7413(a)(5), EPA finds that:

a. The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

b. Neither the preliminary draft PSD permit nor the final draft PSD permit complies with the requirements or prohibitions of the Clean Air Act or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. Furthermore, issuance of a final PSD permit as proposed in the preliminary draft PSD permit or final draft PSD permit would not be in compliance with requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

c. The construction or major modification of the Red Dog mine facility without a valid PSD permit violates Section 165(a) of the Act, 42 U.S.C. § 7475(a). Consequently, the issuance of this Order, pursuant to Section 167 of the Act, 42 U.S.C. § 7477, is necessary to prevent any further construction or modification at the Red Dog mine facility.

V. ORDER

47. Based on investigation and analysis of all relevant facts, including any good faith efforts to comply, and pursuant to Section 167 of the Act, 42 U.S.C. § 7477, effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine facility, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

b. Prior to issuance of a PSD permit to Cominco for Wartsila diesel generators MG-1, MG-3, MG-4, or MG-5,

ADEC is ordered to either include emission limits for MG-1, MG-3, MG-4, and MG-5 that reflect the previous "bubble" limits and result in no increase in actual or allowable emissions from these engines, include NOx emission limits based on SCR, or satisfactorily document why SCR is not BACT for the Wartsila diesel generators at the Red Dog mine facility and to obtain EPA's written concurrence of this determination.

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

48. Such documentation shall be submitted by certified mail with return receipt requested to:

Douglas E. Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

Issued this 10 day of Dec, 1999.

/s/
Chuck Clarke
Regional Administrator
Region 10

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Cominco Alaska, Inc.,	)	Docket No. CAA-10-2000-0035
Proceeding under Sections 113(a)(5) and 167 of the Clean Air Act.	)	ADMINISTRATIVE ORDER (42 U.S.C. §§ 7413(a)(5) and 7477)

I. ADMINISTRATIVE ORDER

1. This Administrative Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to Cominco Alaska, Inc., (Cominco) pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue orders pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance or his designee pursuant to the delegation of authority from the Administrator prior to issuing this Administrative Order.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each air quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR which has been designated as in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R. § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved, as part of the SIP, a State PSD program as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R. § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska

statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Actual emissions" as defined in 18 AAC 50.900(l)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

11. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

12. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

13. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

14. "Best available control technology" is defined in 18 AAC 50.900(9)(1991) as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impact, and other costs.

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from the State of Alaska Department of Environmental Conservation (ADEC). The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section; or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

19. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

20. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

21. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

22. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit that subjects the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

23. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

24. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the

permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

25. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

26. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without authorization under a valid PSD permit.

27. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

28. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate

increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

29. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

30. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission limit based on low NOx controls.

31. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

32. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as that term is defined in 18 AAC 50.300(a)(6).

33. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

34. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent valid permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). Therefore the Red Dog mine facility is a "facility," as listed in 18 AAC 50.300(a)(6)(C).

35. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

36. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledged are subject to

BACT (MG-5 and MG-17). SCR is BACT for the Wartsila diesel generators.

37. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

38. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

39. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit included an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

40. The final draft PSD permit did not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposed to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit was listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

41. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issu-

ance of the permit as proposed in the September 3, 1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted. Additional letters were sent to ADEC on September 28, 1999, and November 10, 1999, further explaining EPA's concerns with the final draft permit.

42. On December 10, 1999, pursuant to the authority of Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, EPA issued a Finding of Noncompliance and Order, Docket No. CAA-10-99-0263, to ADEC (ADEC 113/167 Order). On the same day, the ADEC 113/167 Order was sent by fax and overnight certified mail return receipt requested to Michele Brown, ADEC Commissioner, and faxed to Tom Chapple, ADEC, Director, Division of Air and Water Quality. A copy of the ADEC 113/167 Order was faxed to Doug Horswill, Vice President for Environmental and Corporate Affairs, Cominco, and sent overnight certified mail return receipt requested to John Keys, General Manager, Cominco.

43. The ADEC 113/167 Order provides at paragraph 46a that:

> The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

44. The ADEC 113/167 Order provides, in part, at paragraph 47 that "effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx

controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine facility, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

* * *

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

45. Shortly after receiving the ADEC 113/167 Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 for the Cominco Red Dog Mine on December 10, 1999 (final permit). The final permit was accompanied by a Final Technical Analysis Report dated December 10, 1999 (12/10/99 Technical Report).

46. The 12/10/99 Technical Report states at page 49 that "The Department [ADEC] finds an emission limit achievable with low NOx controls to be BACT on diesel generator MG-17. A vendor-guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT."

47. Section 4, Best Available Control Technology (BACT) for Oxides of Nitrogen (NOx), Condition 20.1 of the final permit requires Wartsila diesel generator MG-17 to limit NOx emissions to no greater than 121.3 lb/hour averaged over any three hours.

48. On February 8, 2000, EPA notified ADEC pursuant to Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) that Permit No. 9932-AC005, issued to Cominco on December 10, 1999, fails to comply with Pact C of the Act, 42 U.S.C. § 7470-7492, the implementing regulations and Alaska SIP, and that the State is not in compliance with Part C of the Act.

49. The issuance of this Order, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, is necessary to prevent any further construction or modification at the Red Dog mine facility.

V. ORDER

50. Based on investigation and analysis of relevant facts, and pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477:

a. Cominco is prohibited from commencing any and all construction or modification activities at the Red Dog mine facility associated with the Wartsila diesel generator MG-17 until Cominco has demonstrated to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, and obtains a valid PSD permit from ADEC for the Wartsila generator MG-17 that complies with the Act and with the December 10, 1999 Finding and Order.

b. Cominco is specifically allowed to continue construction or operation of other portions of the Red Dog mine facility as authorized by ADEC Permit No. 9932-AC005.

c. Cominco shall submit, no later than five (5) days after the effective date of this Order, certification that Cominco has complied with the prohibition in the paragraph 50a above and will continue to comply with paragraph 50a of this Order will Cominco demonstrates to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, Subpart I and the Alaska SIP. Such certification shall be submitted by certified mail with return receipt requested to:

Douglas E. Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

50. Cominco has the opportunity to confer with EPA concerning this Order. Any request for a conference should be made to Mr. Hardesty, Chief, Federal and Delegated Air Programs Unit, within 10 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 16, 2000.

Issued this 8th day of Feb., 2000.

/s/
Chuck Findley
Deputy Regional Administrator

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	AMENDED
Cominco Alaska, Inc.,	)	ADMINISTRATIVE ORDER
	)	
Proceeding under Sections	)	Docket No. CAA-10-2000-0035
113(a)(5) and 167 of the	)	
Clean Air Act.	)	(42 U.S.C. §§ 7413(a)(5)
	)	and 7477)

I. AMENDED ADMINISTRATIVE ORDER

1. This Amended Administrative Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to Cominco Alaska, Inc., (Cominco) pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue orders pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance or his designee pursuant to the delegation of authority from the Administrator prior to issuing this Amended Administrative Order.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR which has been designated as in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved, as part of the SIP, a State PSD program as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Actual emissions" as defined in 18 AAC 50.900(1)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

11. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

12. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

13. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

14. "Best available control technology" is defined in 18 AAC 50.900(9)(1991) as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impacts, and other costs.

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from the State of Alaska, Department of Environmental Conservation (ADEC). The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section; or

> (C) bring a civil action under subsection (b) of this section.
>
> Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

19. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

20. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

21. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

22. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit that subjects the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

23. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

24. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the

permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

25. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

26. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without authorization under a valid PSD permit.

27. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

28. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate

increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

29. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

30. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that, of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission limit based on low NOx controls.

31. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

32. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as that term is defined in 18 AAC 50.300(a)(6).

33. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

34. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent valid permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). Therefore the Red Dog mine facility is a "facility," as listed in 18 AAC 50.300(a)(6)(C).

35. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

36. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledged are subject to

BACT (MG-5 and MG-17). SCR is BACT for the Wartsila diesel generators.

37. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

38. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

39. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit included an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

40. The final draft PSD permit did not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposed to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit was listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

41. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issu-

ance of the permit as proposed in the September 3, 1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted. Additional letters were sent to ADEC on September 28, 1999, and November 10, 1999, further explaining EPA's concerns with the final draft permit.

42. On December 10, 1999, pursuant to the authority of Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, EPA issued a Finding of Noncompliance and Order, Docket No. CAA-10-99-0263, to ADEC (ADEC 113/167 Order). On the same day, the ADEC 113/167 Order was sent by fax and overnight certified mail return receipt requested to Michele Brown, ADEC Commissioner, and faxed to Tom Chapple, ADEC, Director, Division of Air and Water Quality. A copy of the ADEC 113/167 Order was faxed to Doug Horswill, Vice President for Environmental and Corporate Affairs, Cominco, and sent overnight certified mail return receipt requested to John Keys, General Manager, Cominco.

43. The ADEC 113/167 Order provides at paragraph 46a that:

> The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

44. The ADEC 113/167 Order provides, in part, at paragraph 47 that "effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx

controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine faciiity, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

* * *

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

45. Shortly after receiving the ADEC 113/167 Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 for the Cominco Red Dog Mine on December 10, 1999 (final permit). The final permit was accompanied by a Final Technical Analysis Report dated December 10, 1999 (12/10/99 Technical Report).

46. The 12/10/99 Technical Report states at page 49 that "The Department [ADEC] finds an emission limit achievable with low NOx controls to be BACT on diesel generator MG-17. A vendor-guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT."

47. Section 4, Best Available Control Technology (BACT) for Oxides of Nitrogen (NOx), Condition 20.1 of the final permit requires Wartsila diesel generator MG-17 to limit NOx emissions to no greater than 121.3 lb/hour averaged over any three hours.

48. On February 8, 2000, EPA notified ADEC pursuant to Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) that Permit No. 9932-AC005, issued to Cominco on December 10, 1999, fails to comply with Part C of the Act, 42 U.S.C. § 7470-7492, the implementing regulations and Alaska SIP, and that the State is not in compliance with Part C of the Act. Cominco received a copy of the notification by fax on February 8, 2000, and by certified mail on February 16, 2000.

49. On February 8, 2000, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. § 7413(a)(5) and 7477, EPA issued an Administrative Order to Cominco prohibiting the construction of MG-17 prior to receipt of a valid PSD permit. Cominco received a copy of the Order by fax on February 8, 2000 and by certified mail on February 10, 2000.

50. On February 16, 2000, Cominco requested that EPA stay the December 10, 1999 Order to ADEC and the February 8, 2000 Order to Cominco.

51. The issuance of this Amended Order, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, is necessary to prevent specified further construction or modification at the Red Dog mine facility.

IV. AMENDED ORDER

52. Based on investigation and analysis of relevant facts, and pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477:

a. With exception of the activities specified below, Cominco is prohibited from commencing construction or modification activities at the Red Dog mine facility associated with the Wartsila diesel generator MG-17 until Cominco has demonstrated to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, and obtains a valid PSD permit from ADEC for the Wartsila generator MG-17 that complies with the Act and with the December 10, 1999 Finding and Order. Cominco may conduct the following:

(i) order, purchase and fabricate the Wartsila generator, MG-17 and the equipment necessary to install and operate it;

(ii) design, order, purchase and fabricate the equipment necessary to install and operate SCR;

(iii) design and erect the MG-17 module;

(iv) install MG-17 in the module;

(v) transport module and the associated equipment to the Red Dog mine site;

(vi) transport SCR and the associated equipment to the Red Dog mine site;

(vii) conduct ground excavation necessary for the module and MG-17;

(viii) conduct ground excavation necessary for SCR;

(ix) pour concrete foundations necessary for MG-17;

(x) pour concrete foundations necessary for SCR; and

(xi) conduct other weather-limited activities with advance approval of EPA.

b. Cominco is specifically allowed to continue construction or operation of other portions of the Red Dog mine facility as authorized by ADEC Permit No. 9932-AC005.

c. Cominco shall submit, no later than five (5) days after the effective date of this Order, certification that Cominco has complied with the prohibition in the paragraph 52a above and will continue to comply with paragraph 52a of this Order until Cominco demonstrates to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, Subpart I and the Alaska SIP. Such certification shall be submitted by certified mail with return receipt requested to:

Douglas Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

53. Cominco has the opportunity to confer with EPA concerning this Amended Order. Any request for a conference should be made to Mr. Hardesty, Manager, Federal and Delegated Air Programs Unit, within 5 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 23, 2000. An Order issued under Section 113 of the CAA shall not take effect until the person to whom it is issued has the opportunity to confer with the EPA. This Amended Order is effective March 24, 2000.

54. This Amended Order specifically supercedes and vacates the Administrative Order issued to Cominco on February 8, 2000.

Issued this 7th day of March, 2000.

/s/
Chuck Findley
Deputy Regional Administrator